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No. 79-1313

In the Supreme Court of the United States

OCTOBER TERM, 1979

JACOB R. WARD, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Petitioner seeks review of the decision below holding (1) that he lacked standing to challenge the constitutionality of the exemption from self-employment tax granted by Section 1402(g)[1] of the Internal Revenue Code of 1954 (26 U.S.C.), and (2) that the denial of such an exemption under the circumstances of this case does not violate his rights under either the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment.

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[1]During the period to which the self-employment taxes here in issue relate (1973-1976), the provisions referred to in the petition as Section 1402(g) of the Code were actually set forth in Subsection (h). These provisions were redesignated as Subsection (g), effective for 1977 and later years, by Section 1901(a)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789. In order to avoid confusion, we will follow petitioner's practice of referring to the provision as Section 1402(g).

During the period 1973-1976, petitioner was self-employed as a salesman and earned a total of $71,603 in income from self-employment within the meaning of Section 1402(b) of the Code (Pet. App. A 13; Pet. App. B 22). He did not, however, pay any self-employment tax during those years. Instead, he filed a Form 4029 (Application for Exemption from Tax on Self-Employment Income and Waiver of Benefits) on which he stated that he was a member of a group "conscientiously opposed to payments to social security" (Pet. App. B 22-24).

The Commissioner of Internal Revenue denied petitioner's application for exemption on the ground that "he had not established that he qualified as a duly ordained minister or as a member of a qualified religious faith under Sections 1402(e) and (g) of the Internal Revenue Code"[2] (Pet. App. B 25). Accordingly, he issued

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[2]Section 1402(e) of the Code provides that duly ordained, commissioned, or licensed ministers, members of religious orders, and Christian Science practitioners, who are opposed on grounds of conscience or religious principle to any form of public insurance (including social security) which makes payments in the event of death, disability, old age, retirement, or for medical care, are exempted from the imposition of the self-employment tax with respect to income from services performed as such minister, member of a religious order, or Christian Science practitioner.

Section 1402(g) (formerly Section 1402(h)—see note 1, *supra*) provides a further exemption for members of recognized religious sects who, by reason of adherence to the established tenets or teachings of such sect, conscientiously oppose acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old age or retirement, or for medical care. As a further condition of this exemption, the Secretary of Health, Education, and Welfare must determine that the sect has an established practice of reasonably providing for its dependent members.

notices of deficiency asserting liability for the unpaid self-employment taxes on petitioner's income from self-employment for these years. Petitioner contested these deficiencies in the Tax Court, which upheld the Commissioner's determinations (Pet. App. A 12-21). The court of appeals affirmed (Pet. App. B 22-29).

1. The decision below correctly held that petitioner could not challenge the constitutionality of Section 1402(g) under the Establishment and Free Exercise Clauses of the First Amendment.[3] The jurisdiction of the Tax Court is limited to determining the amount of the deficiency (or overpayment) with respect to the particular taxes in issue. Petitioner makes no claim that his income for the period was not income from self-employment within the meaning of Section 1402(b), or that he actually qualifies for any exemption provided by law from the tax imposed on such income by Section 1401(a) of the Code. The Tax Court therefore correctly sustained the deficiencies in question, without regard to whether the exemption is properly conferred on those individuals who do fall within the terms of Section 1402(g). See *Kirk* v. *Commissioner*, 425 F. 2d 492 (D.C. Cir.), cert. denied, 400 U.S. 853 (1970). Since petitioner's own tax liability would not be affected by a determination as to the constitutionality of the exemption provisions in question, he had no standing to challenge their constitutionality in this proceeding. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37-39 (1976).

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[3]Petitioner has not challenged the constitutionality of Section 1402(e) in this case.

2. Even on the assumption that petitioner could avoid his own liability for the self-employment taxes in question on the basis of his First Amendment objections to the exemption granted by Section 1402(g), the Tax Court correctly concluded (Pet. App. A 16-20) that these provisions violate neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. Accord: *Jaggard* v. *Commissioner*, 582 F. 2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *Hatcher* v. *Commissioner*, 37 T.C.M. 304 (1978), affirmed by unpublished opinion, No. 78-1883 (10th Cir. July 27, 1979), cert. denied, No. 79-5692 (Feb. 19, 1980); *Lerner* v. *Commissioner*, 34 T.C.M. 331 (1975), affirmed by unpublished order, No. 75-1770 (3d Cir. Jan 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969). The granting of this exemption to others in no way impairs petitioner's free exercise of his own religious beliefs. Moreover, notwithstanding its limitation to members of certain narrowly defined religious sects (see *Wisconsin* v. *Yoder*, 406 U.S. 205, 221-223, n. 11 (1972)), the courts have also uniformly concluded that Section 1402(g) does not violate the Establishment Clause since its purpose is "neither the advancement nor the inhibition of religions." *Jaggard* v. *Commissioner*, *supra*, 582 F. 2d at 1190. Rather, as the Eighth Circuit noted in *Jaggard* (*ibid.*):

> It represents a congressional attempt to accomodate sincerely held religious beliefs against private and public insurance programs consistent with the overall welfare purpose of the Social Security Act. Congress could reasonably conclude that individuals on their own could not be relied upon to provide for themselves in the event of dependency, but that members of a religious sect who share these views would provide for dependent members.

3. Finally, the court below correctly held that Section 1402(g) does not arbitrarily discriminate against petitioner. "Neither due process nor equal protection imposes * * * any rigid rule of equality of taxation." *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 509 (1937). The legislative classification for tax exemption here is permissible in light of the congressional purpose of accomodating the religious beliefs of those who have firmly based religious convictions against the acceptance of benefits such as those provided by the Social Security Act and who, at the same time, are members of groups having a long-established practice of adequately providing for their dependent members.[4] *Jaggard* v. *Commissioner*, *supra*; H.R. Rep. No. 213, 89th Cong. 1st Sess. 101 (1965).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Indeed, even on the assumption that the Constitution requires this exemption to be extended to members of secular groups that similarly provide for their own dependent members, petitioner did not allege that he was, in fact, a member of any such group. Accordingly, the alleged sincerity of his conscientious objection to public insurance would not in itself qualify him, in any event, for the exemption.

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